MAY 21 1974

In The

Supreme Court of the United States

MAY 21
INSURANCE BOARD

October Term, 1973

No. 73-1315

MORNINGSIDE RENEWAL COUNCIL, INC., and RIVERSIDE DEMOCRATS, INC.,

Petitioners,

vs.

UNITED STATES ATOMIC ENERGY COMMISSION, UNITED STATES OF AMERICA and TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

JOHN G. LIPSETT
Attorney for Petitioners
420 Lexington Avenue
New York, New York 10017
(212) 685-4294

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Petitioners take issue with the brief in opposition of the federal respondents in the following respects:

1. While citing the recent decision of this Court in *National Labor Relations Board v. Bell Aerospace Co.*, 42 Unites States Law Week 4564 (April 23, 1974), the federal respondents do not show any circumstances such as were present there to justify absence of general accident standards for research reactors in this case. Unlike the *Bell Aerospace Co.* case, where this Court stated, at 42 United

States Law Week 4572, that adjudication was "especially appropriate in the instant context," that "it is doubtful whether any generalized standard could be framed which would have more than marginal utility" and that the "Board's judgment that adjudication best serves [the purpose of developing its standards] is entitled to great weight," there has been no showing here that ad hoc adjudication has been or would be appropriate, that generalized standards would not be useful or that it was the agency's judgment that ad hoc adjudication best served the purpose of developing standards. Indeed, past ad hoc determinations in regard to research reactors produced a shifting basis of safety evaluation and the agency's Appeal Board (supporting the conclusions of its Licensing Board in this respect) expressly recommended the formulation of accident standards for research reactors.

The federal respondents also rely on the Appeal Board's finding that radiation releases from the postulated accident accepted by it in this proceeding would be less than 10 C.F.R. Part 20 limits under the conditions imposed. However, it must be noted that the Appeal Board's postulated accident and fission products release fraction (with which petitioners do not agree) are not necessarily those which would result from a rule-making proceeding designed to formulate general accident standards for research reactors.

2. The federal respondents claim that the issue of the proper standard of judicial review of an agency determination that no environmental impact statement need be prepared, concerning which a conflict exists in the Circuits (see cases cited in *Wyoming Outdoor Co-ordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973), is not involved here since there was a

reviewable environmental record made with the participation of the public. However, petitioners do not believe that the fact that there is a reviewable environmental record would justify the use of an improper standard of review. This Court has reversed decisions of the Circuit Courts where an improper standard of review has been applied, see *Federal Trade Commission v. Proctor & Gamble Co.*, 386 U.S. 568, 576 (1967); *National Labor Relations Board v. Walton Mfg. Co.*, 369 U.S. 404, 408-09 (1962).

Finally, the federal respondents rely on the case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). This case, however, was not overlooked by the Courts of Appeals for the Fifth and Tenth Circuits in reaching their decisions that a standard of reasonableness, rather than an arbitrary capricious standard, applies to the review of an agency decision not to prepare an environmental impact statement, see *Save One Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973).

While petitioners agree with the Fifth and Tenth Circuits that a standard of reasonableness should be applied, they also support the view of the dissenting judge below that the Commission's finding in this case that no impact statement was required was arbitrary and capricious.

Respectfully submitted,

s/ John G. Lipsett
Attorney for Petitioners